

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

PRIVATE ATTORNEY GEN DUANE
M PETTY,

Plaintiff,

6:22-CV-0620
(MAD/ML)

v.

VINCENT J BONO, Herkimer County
Legislative Chairman; HERKIMER
COUNTY LEGISLATOR; and DISTRICT
11 CHAIRMAN,

Defendants.

APPEARANCES:

OF COUNSEL:

DUANE M PETTY
Plaintiff, *Pro Se*
79 North Third Avenue
Ilion, New York 13357

MIROSLAV LOVRIC, United States Magistrate Judge

ORDER and REPORT-RECOMMENDATION

The Clerk has sent this *pro se* Complaint (Dkt. No. 1) together with an application to proceed *in forma pauperis* (Dkt. No. 2), a letter requesting an injunction (Dkt. No. 3), and an amended complaint (Dkt. No. 6) to the Court for review. For the reasons discussed below (1) Plaintiff's motion for leave to proceed *in forma pauperis* (Dkt. No. 2) is granted; (2) I recommend that his Amended Complaint (Dkt. No. 6) be dismissed in its entirety (a) in part without leave to amend, and (b) in part with leave to amend, and (3) I recommend that his request for an injunction (Dkt. No. 3) be denied.

I. BACKGROUND

Liberally construed,¹ Plaintiff's Amended Complaint² asserts that his rights were violated by Defendants Vincent J Bono, Herkimer County Legislator, and District 11 chairman (collectively "Defendants"). (*See generally* Dkt. No. 6.)

The allegations in the Amended Complaint are convoluted and difficult to follow. (*Id.*) However, it appears as though the gravamen of Plaintiff's Amended Complaint is that Defendants incorrectly designated Plaintiff's property as commercial, when, in fact, it is used for residential purposes. (*Id.*) Plaintiff alleges that obtaining housing is difficult for him because of his disability—the treatment for which, requires that Plaintiff have access to a "quiet" room. (*Id.*)

Although Plaintiff does not appear to assert any legal claims, he cites the following seven statutes: (1) N.Y. Real Prop. Tax Law § 304; (2) 18 U.S.C. § 1964; (3) 18 U.S.C. § 2332b(9); (4) N.Y. Real Prop. Tax Law § 300; (5) 18 U.S.C. § 371; (6) 18 U.S.C. § 241; (7) N.Y. Penal Law § 496.05. (*Id.*) The Amended Complaint does not appear to seek any relief. However, Plaintiff filed a letter requesting an injunction regarding the seizure of his "personal tangible properties" that "county officials listed have seized" until this lawsuit is resolved. (Dkt. No. 3.)

Plaintiff also filed an application to proceed *in forma pauperis*. (Dkt. No. 2.)

¹ The court must interpret *pro se* complaints to raise the strongest arguments they suggest. *Soto v. Walker*, 44 F.3d 169, 173 (2d Cir. 1995) (quoting *Burgos v. Hopkins*, 14 F.3d 787, 790 (2d Cir. 1994)).

² An amended complaint ordinarily supersedes the original and renders it of no legal effect. *Int'l Controls Corp. v. Vesco*, 556 F.2d 665, 668-69 (2d Cir. 1977).

II. PLAINTIFF’S APPLICATION TO PROCEED *IN FORMA PAUPERIS*

“When a civil action is commenced in a federal district court, the statutory filing fee, currently set at \$402, must ordinarily be paid. 28 U.S.C. § 1914(a). A court is authorized, however, to permit a litigant to proceed *in forma pauperis* status if a party “is unable to pay” the standard fee for commencing an action. 28 U.S.C. § 1915(a)(1).³ After reviewing Plaintiff’s *in forma pauperis* application (Dkt. No. 2), the Court finds that Plaintiff meets this standard.

Therefore, Plaintiff’s application to proceed *in forma pauperis* is granted.⁴

III. RELEVANT LEGAL STANDARD GOVERNING INITIAL REVIEW OF A COMPLAINT

“Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that . . . the action . . . (i) is frivolous or malicious; (ii) fails to state a claim on which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from such relief.” 28 U.S.C. § 1915(e)(2).

In order to state a claim upon which relief can be granted, a complaint must contain, *inter alia*, “a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). The requirement that a plaintiff “show” that he or she is entitled to relief means that a complaint “must contain sufficient factual matter, accepted as true, to ‘state a claim

³ The language of that section is ambiguous because it suggests an intent to limit availability of *in forma pauperis* status to prison inmates. *See* 28 U.S.C. § 1915(a)(1) (authorizing the commencement of an action without prepayment of fees “by a person who submits an affidavit that includes a statement of all assets such prisoner possesses”). The courts have construed that section, however, as making *in forma pauperis* status available to any litigant who can meet the governing financial criteria. *Hayes v. United States*, 71 Fed. Cl. 366, 367 (Fed. Cl. 2006); *Fridman v. City of N.Y.*, 195 F. Supp. 2d 534, 536 n.1 (S.D.N.Y. 2002).

⁴ Plaintiff is reminded that, although his amended application to proceed *in forma pauperis* has been granted, he is still required to pay fees that he may incur in this action, including copying and/or witness fees.

to relief that is *plausible* on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (emphasis added) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “Determining whether a complaint states a plausible claim for relief . . . requires the . . . court to draw on its judicial experience and common sense. . . . [W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not shown—that the pleader is entitled to relief.” *Iqbal*, 556 U.S. at 679 (internal citation and punctuation omitted).

“In reviewing a complaint . . . the court must accept the material facts alleged in the complaint as true and construe all reasonable inferences in the plaintiff’s favor.” *Hernandez v. Coughlin*, 18 F.3d 133, 136 (2d Cir. 1994) (citation omitted). However, “the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Iqbal*, 556 U.S. at 678.

Courts are “obligated to construe a pro se complaint liberally.” *Harris v. Mills*, 572 F.3d 66, 72 (2d Cir. 2009); *see also Nance v. Kelly*, 912 F.2d 605, 606 (2d Cir. 1990) (per curiam) (reading the plaintiff’s *pro se* complaint “broadly, as we must” and holding that the complaint sufficiently raised a cognizable claim). “[E]xtreme caution should be exercised in ordering sua sponte dismissal of a pro se complaint before the adverse party has been served and [the] parties . . . have had an opportunity to respond.” *Anderson v. Coughlin*, 700 F.2d 37, 41 (2d Cir. 1983).

The Court, however, also has an overarching obligation to determine that a claim is not legally frivolous before permitting a *pro se* plaintiff’s complaint to proceed. *See, e.g., Fitzgerald v. First East Seventh St. Tenants Corp.*, 221 F.3d 362, 363 (2d Cir. 2000) (holding that a district court may *sua sponte* dismiss a frivolous complaint, notwithstanding the fact that the plaintiff

paid the statutory filing fee). “Legal frivolity . . . occurs where ‘the claim is based on an indisputably meritless legal theory [such as] when either the claim lacks an arguable basis in law, or a dispositive defense clearly exists on the face of the complaint.’” *Aguilar v. United States*, 99-MC-0304, 99-MC-0408, 1999 WL 1067841, at *2 (D. Conn. Nov. 8, 1999) (quoting *Livingston v. Adirondack Beverage Co.*, 141 F.3d 434, 437 (2d Cir. 1998)); *see also Neitzke v. Williams*, 490 U.S. 319, 325 (1989) (“[D]ismissal is proper only if the legal theory . . . or factual contentions lack an arguable basis.”); *Pino v. Ryan*, 49 F.3d 51, 53 (2d Cir. 1995) (“[T]he decision that a complaint is based on an indisputably meritless legal theory for purposes of dismissal under section 1915(d), may be based upon a defense that appears on the face of the complaint.”).

IV. ANALYSIS

In addressing the sufficiency of a plaintiff’s complaint, the court must construe his pleadings liberally. *Sealed Plaintiff v. Sealed Defendant*, 537 F.3d 185, 191 (2d Cir. 2008). Having reviewed Plaintiff’s Amended Complaint with this principle in mind, I recommend that all causes of action be dismissed.

A. RICO Claims⁵

Plaintiff appears to assert a claim against Defendants pursuant to RICO. It is “unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of racketeering activity.” 18 U.S.C. §

⁵ Under General Order #14 and N.D.N.Y. L.R. 9.2, a party who files a RICO claim must also file a Civil RICO statement within thirty days after the filing date of the Complaint. Despite thirty days having elapsed since the filing of his Amended Complaint (and his Complaint, which also appeared to assert a RICO claim), Plaintiff has failed to file a Civil RICO statement. (*See generally* docket sheet.)

1962(c). Section 1964 establishes a private right of action for individuals who are harmed by racketeering activity. 18 U.S.C. § 1964. This private right of action permits a plaintiff to bring a RICO claim for sustaining injuries “in his business or property by reason of a violation of section 1962.” 18 U.S.C. § 1964(c). Generally, a plaintiff bringing a civil RICO claim under “Section 1962(c) must allege that (1) the defendant has violated the substantive RICO statute, and (2) the plaintiff was injured in his business or property “by reason of a violation of section 1962.”

Malvar Egerique v. Chowaiki, 19-CV-3110, 2020 WL 1974228, at *7 (S.D.N.Y. Apr. 24, 2020) (citing *Moss v. Morgan Stanley, Inc.*, 719 F.2d 5, 17 (2d Cir. 1983) (citing 18 U.S.C. § 1962(c))). More specifically, to assert a civil RICO claim under Section 1962(c), a plaintiff must allege the following elements: “(1) conduct, (2) of an enterprise, (3) through a pattern, (4) of racketeering activity.” *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 496 (1985). Additionally, a plaintiff asserting a civil RICO claim must plead facts plausibly suggesting a resulting “domestic injury” to their business or property. *RJR Nabisco, Inc. v. European Community*, 136 S. Ct. 2090, 2111 (2016).

Claims to enforce RICO cannot be pursued against Defendants—as employees of Herkimer County—to the extent that they are sued in their official capacities, because a municipality cannot form the requisite criminal intent to establish a predicate act. *Naples v. Stefanelli*, 972 F. Supp. 2d 373, 389 (E.D.N.Y. 2013); see *Liang v. City of New York*, 10-CV-3089, 2013 WL 5366394, at *12 (E.D.N.Y. Sept. 24, 2013) (collecting cases) (“[A]s many previous courts in this Circuit have held, ‘a municipal corporation is incapable of having the criminal intent to support RICO’s predicate offense requirement.’”).

With respect to Plaintiff’s claims against Defendants in their individual capacities, he fails to allege facts plausibly suggesting the existence of an “enterprise” within the meaning of

RICO. Although Plaintiff's claims are against individuals employed by Herkimer County, he fails to plead any facts plausibly suggesting that Defendants constitute, control, or participate in any enterprise with a distinguishable existence or purpose. *See Mackin v. Auberger*, 59 F. Supp. 3d 528, 543 (W.D.N.Y. 2014) ("Plaintiff fails to allege that [the defendants] had a common or shared purpose or that they functioned as a continuing unit."). In addition, the Amended Complaint fails to allege any facts plausibly suggesting that Defendants functioned as a continuing unit. "Without such an enterprise, a RICO claim like [Plaintiff]'s must fail." *Liang*, 2013 WL 5366394, at *13; *see also Peterson v. City of New York*, 11-CV-3141, 2012 WL 75029, at *3-4 (S.D.N.Y. Jan. 9, 2012) (dismissing the plaintiff's RICO claim because "[t]he existence of a RICO enterprise is a necessary element for liability" and the plaintiff failed to allege facts plausibly suggesting the existence of a RICO enterprise).

Moreover, I find that the Amended Complaint fails to allege facts plausibly suggesting a pattern of racketeering activity. 18 U.S.C. § 1961(5) (To sufficiently allege a "pattern of racketeering activity," a plaintiff must allege at least two acts of "racketeering activity" that occur within ten years of each other); *Westester Cnty. Indep. Party v. Astorino*, 137 F. Supp. 3d 586, 608 (S.D.N.Y. 2015) (emphasis in original) (quoting *Cofacredit, S.A. v. Windsor Plumbing Supply Co.*, 187 F.3d 229, 242 (2d Cir 1999)) (To qualify as a "pattern" of racketeering activity, the predicate acts "must be from the crimes listed in [Section] 1961(1) and they must be 'related, and . . . amount to or pose a threat of continued criminal activity.'").

As a result, I recommend that Plaintiff's RICO claim be dismissed.

B. Claims Alleging Violations of Criminal Law

There is no private right of action to enforce state or federal criminal statutes. *See generally Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973) ("[A] private citizen lacks a

judicially cognizable interest in the prosecution or nonprosecution of another.”); *see also Walker v. CIBC Ltd.*, 20-CV-1337, 2021 WL 3518439, at *5 (N.D.N.Y. Apr. 13, 2021) (Hummel, M.J.) (“It appears plaintiff is either seeking the criminal prosecution of an individual or individuals or a law enforcement investigation, which is beyond this Court’s jurisdiction.”), *report-recommendation adopted by* 2021 WL 3204860 (N.D.N.Y. July 29, 2021) (McAvoy, J.); *McFadden v. Ortiz*, 12-CV-1244, 2013 WL 1789593, at *3 (N.D.N.Y. Apr. 26, 2013) (D’Agostino, J.) (holding that “there is no private right of action to enforce either state or federal criminal statutes.”).

As a result, I recommend that, to the extent Plaintiff alleges claims pursuant to 18 U.S.C. §§ 241, 371, 2332b and N.Y. Penal Law § 496.05, those claims be dismissed. *See Hall v. Sampson*, 21-CV-4839, 2022 WL 2068248, at *2 n.2 (E.D. Pa. June 8, 2022) (collecting cases) (holding that the plaintiff cannot bring criminal charges against the defendants through a private lawsuit and that claims pursuant to, *inter alia*, 18 U.S.C. §§ 241, 371 do not give rise to a civil cause of action); *Ible v. Wells Fargo Bank*, 21-CV-0025, 2021 WL 1582419, at *6 (N.D. Fla. Apr. 6, 2021) (dismissing the plaintiff’s criminal allegations—including a claim pursuant to 18 U.S.C. § 2332b—for lack of standing); *Patterson v. Patterson*, 16-CV-0844, 2019 WL 1284346, at *7 (W.D.N.Y. Mar. 20, 2019) (quoting *Christian v. Town of Riga*, 649 F. Supp. 2d 84, 91 (W.D.N.Y. 2009)) (“Courts within this Circuit have accordingly held consistently that criminal charges under New York law ‘cannot be prosecuted by a private person.’”); *Walthour v. Herron*, 10-01495, 2010 WL 1877704, at *2 (E.D. Pa. May 6, 2010) (recognizing no private right of action under, *inter alia*, 18 U.S.C. §§ 241, 371).

C. State Claims

Having found that all of Plaintiff’s federal claims are subject to dismissal, I recommend that, to the extent that Plaintiff has asserted any state law claims (for example, pursuant to N.Y. Real Prop. Tax Law §§ 300, 304), the Court decline to exercise jurisdiction over those claims. *See* 28 U.S.C. § 1367(c)(3) (providing that a district court “may decline to exercise supplemental jurisdiction over [pendent state law claims] if . . . the district court has dismissed all claims over which it has original jurisdiction”); *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n.7 (1988) (“[I]n the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine—judicial economy, convenience, fairness, and comity—will point toward declining to exercise jurisdiction over the remaining state-law claims.”); *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 53 (2d Cir. 1986) (citing *Kavit v. A.L. Stamm & Co.*, 491 F.2d 1176, 1180 (1974)) (holding that “federal courts, absent exceptional circumstances, should abstain from exercising pendent jurisdiction when federal claims in a case can be disposed of by summary judgment”).

V. OPPORTUNITY TO AMEND

Generally, a court should not dismiss claims contained in a complaint filed by a *pro se* litigant without granting leave to amend at least once “when a liberal reading of the complaint gives any indication that a valid claim might be stated.” *Branum v. Clark*, 927 F.2d 698, 704-05 (2d Cir. 1991); *see also* Fed. R. Civ. P. 15(a)(2) (“The court should freely give leave when justice so requires.”). An opportunity to amend is not required, however, where “the problem with [the plaintiff’s] causes of action is substantive” such that “better pleading will not cure it.” *Cuoco v. Moritsugu*, 222 F.3d 99, 112 (2d Cir. 2000); *see also Cortec Indus. Inc. v. Sum Holding L.P.*, 949 F.2d 42, 48 (2d Cir. 1991) (“Of course, where a plaintiff is unable to allege any fact

sufficient to support its claim, a complaint should be dismissed with prejudice.”). Stated differently, “[w]here it appears that granting leave to amend is unlikely to be productive, . . . it is not an abuse of discretion to deny leave to amend.” *Ruffolo v. Oppenheimer & Co.*, 987 F.2d 129, 131 (2d Cir. 1993); *accord, Brown v. Peters*, 95-CV-1641, 1997 WL 599355, at *1 (N.D.N.Y. Sept. 22, 1997) (Pooler, J.).

In this case, it is not clear whether better pleading would permit Plaintiff to assert a cognizable RICO cause of action against Defendants in their individual capacities. Out of deference to Plaintiff’s *pro se* status, I recommend that Plaintiff be granted leave to amend the Amended Complaint with respect to his RICO claim against Defendants in their individual capacities and state law claims.

However, I recommend that Plaintiff’s RICO claim against Defendants in their official capacities be dismissed without leave to amend because the problem with that claim is substantive such that a better pleading will not cure it. *See Naples*, 972 F. Supp. 2d at 402 (dismissing without leave to amend the plaintiff’s RICO claims against the county defendant and its employees in their official capacities because the problem with the claim was substantive). Moreover, I recommend that Plaintiff’s claims alleging violations of criminal law be dismissed without leave to amend for the same reason. *See Eggsware v. Albany Masonic Temple*, 21-CV-0933, 2022 WL 1115632, at *3-4 (N.D.N.Y. Mar. 28, 2022) (Lovric, M.J.) (recommending dismissal without leave to replead the plaintiff’s claims alleging violations of the criminal law finding that the plaintiff did “not have standing to compel any law enforcement agency to prosecute any suspected criminal acts because there is no private right of action to enforce state or federal criminal statutes.”), *report and recommendation adopted by* 2022 WL 1115360 (N.D.N.Y. Apr. 14, 2022) (Sharpe, J.).

If Plaintiff chooses to avail himself of an opportunity to amend, such amended pleading must set forth a short and plain statement of the facts on which he relies to support any legal claims asserted. Fed. R. Civ. P. 8(a). In addition, the second amended complaint must include allegations reflecting how the individuals named as Defendants are involved in the allegedly unlawful activity. Finally, Plaintiff is informed that any second amended complaint will replace the existing Amended Complaint, and must be a wholly integrated and complete pleading that does not rely upon or incorporate by reference any pleading or document previously filed with the Court. *See Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1128 (2d Cir. 1994) (“It is well established that an amended complaint ordinarily supersedes the original, and renders it of no legal effect.” (internal quotation marks omitted)).

VI. PLAINTIFF’S LETTER SEEKING AN INJUNCTION

Plaintiff has also submitted a letter request seeking an injunction, which I construe as a request for a preliminary injunction because it asks that the Court take action “until this matter is tried in this federal court proceeding.” (Dkt. No. 3.)

The standard to be applied when considering an application for preliminary injunctive relief is well settled:

A party seeking a preliminary injunction ordinarily must show: (1) a likelihood of irreparable harm in the absence of the injunction; and (2) either a likelihood of success on the merits or sufficiently serious questions going to the merits to make them a fair ground for litigation, with a balance of hardships tipping decidedly in the movant's favor. When the movant seeks a ‘mandatory’ injunction—that is, as in this case, an injunction that will alter rather than maintain the status quo-[he] must meet the more rigorous standard of demonstrating a ‘clear’ or ‘substantial’ likelihood of success on the merits.

Doninger v. Niehoff, 527 F.3d 41, 47 (2d Cir. 2008) (citations omitted).

In the present matter, the Court recommends dismissal of the action. As such, I cannot find either a likelihood of success on the merits or a sufficiently serious question going to the

merits to make them a fair ground for litigation. As a result, I recommend that Plaintiff's request for a preliminary injunction (Dkt. No. 3) be denied.

ACCORDINGLY, it is

ORDERED that Plaintiff's application to proceed *in forma pauperis* (Dkt. No. 2) is **GRANTED**; and it is further

RECOMMENDED that the Court **DISMISS WITH LEAVE TO REPLEAD** Plaintiff's Amended Complaint (Dkt. No. 6) to the extent that it asserts (1) a claim pursuant to RICO against Defendants in their individual capacities, and (2) any state law claims, because they fail to state a claim upon which relief may be granted pursuant to 28 U.S.C. § 1915(e)(2)(B); and it is further respectfully

RECOMMENDED that the Court **DISMISS WITHOUT LEAVE TO REPLEAD** Plaintiff's Amended Complaint (Dkt. No. 6) to the extent that it asserts (1) a RICO claim against Defendants in their official capacities, and (2) claims pursuant to 18 U.S.C. §§ 241, 371, 2332b and New York Penal Law § 496.05, because they fail to state a claim upon which relief may be granted pursuant to 28 U.S.C. § 1915(e)(2)(B); and it is further respectfully

RECOMMENDED that the Court **DENY** Plaintiff's request for a preliminary injunction (Dkt. No. 3); and it is further

ORDERED that the Clerk of the Court shall serve a copy of this Order Report-Recommendation on Plaintiff, along with copies of the unpublished decisions cited herein in accordance with the Second Circuit's decision in *Lebron v. Sanders*, 557 F.3d 76 (2d Cir. 2009) (per curiam).

NOTICE: Pursuant to 28 U.S.C. § 636(b)(1), the parties have fourteen days within which to file written objections to the foregoing report.⁶ Such objections shall be filed with the Clerk of the Court. **FAILURE TO OBJECT TO THIS REPORT WITHIN FOURTEEN DAYS WILL PRECLUDE APPELLATE REVIEW.** 28 U.S.C. § 636(b)(1) (Supp. 2013); Fed. R. Civ. P. 6(a), 6(d), 72; *Roldan v. Racette*, 984 F.2d 85 (2d Cir. 1993) (citing *Small v. Sec’y of Health and Human Servs.*, 892 F.2d 15 (2d Cir. 1989)).

Dated: July 28, 2022
Binghamton, New York


Miroslav Lovric
U.S. Magistrate Judge

⁶ If you are proceeding *pro se* and served with this report, recommendation, and order by mail, three additional days will be added to the fourteen-day period, meaning that you have seventeen days from the date that the report, recommendation, and order was mailed to you to serve and file objections. Fed. R. Civ. P. 6(d). If the last day of that prescribed period falls on a Saturday, Sunday, or legal holiday, then the deadline is extended until the end of the next day that is not a Saturday, Sunday, or legal holiday. Fed. R. Civ. P. 6(a)(1)(C).